

APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH
CIRCUIT
No. 9299

WILLARD F. VAN PELET, APPELLANT AND CROSS-
APPELLEE

v.

THE UNITED STATES OF AMERICA, APPELLEE AND
CROSS-APPELLANT

Appeal From the District Court of the United
States for the Southern District of Ohio, Western
Division

Decided April 6, 1943

Before HICKS, ALLEN, and McALLISTER, Circuit
Judges.

McALLISTER, Circuit Judge. Appellant, Willard F. Van Pelt, brought suit to recover monthly disability payments on a government convertible life insurance policy, and after an adverse verdict and judgment entered thereupon, appealed, claiming error on the part of the trial court in refusing to submit proposed interrogatories to the jury, and for erroneous instructions. Because of our determination of the case, it is unnecessary to consider a cross-appeal filed by appellee.

When appellant entered the armed forces in May 1918 he procured a yearly renewable term insurance policy in the principal sum of \$10,000. He permitted the policy to lapse in July, 1919, for nonpayment of a premium. On July 1, 1927, he

procured reinstatement and conversion of the policy to a United States Government convertible term insurance policy, in the principal sum of \$5,000. In May of 1934, appellant suffered an attack of general paralysis of the insane, and his guardian applied for disability benefits, which were awarded in October, 1934, by the Insurance Claims Council of the Veterans' Administration. These benefits were paid for a total period of 59 months, until March 1939. Thereafter the Council reviewed the case, found that appellant had procured reinstatement by fraud, and thereupon canceled the policy.

The fraud alleged by the Government, upon which reinstatement of the policy was procured, was that appellant had suffered from syphilis before he joined the armed forces; that he was afflicted with the disease in 1926 and received, at that time, treatments for it from a physician; and that he represented, as a basis for reinstatement of his insurance, that he had never been afflicted with the disease.

It is admitted by appellant that he had syphilis before his enlistment in 1918. However, he claims that he thought that it had been cured, and that he did not know of its active condition prior to reinstatement of his insurance. He insists that he did not receive treatments from a physician for the disease, subsequent to his enlistment, until three years after the insurance was reinstated. Appellant further contends that in his answers as to his physical condition, during his medical examination and for purposes of the medical report, he understood that the questions were di-

rected to cover only the period subsequent to the lapse of his policy in 1919; and that all of his answers, based on this belief, were true. In addition, he contends that the Veterans' Bureau had no right to inquire as to a syphilitic condition existing prior to his enlistment, inasmuch as he was entitled to a conclusive presumption that he was in sound physical condition as of the date of his enlistment; and that instructions to the jury on the question of his alleged total and permanent disability were erroneous.

Briefly, the chief errors alleged are that the trial court held that the Government was entitled to inquire of appellant as to a syphilitic condition existing prior to his enlistment, and refuse reinstatement on proof thereof; that representations of appellant, knowingly made and contrary to the actual fact, that he was not so afflicted prior to such enlistment, would be fraudulent; and that the court erred in refusing to submit special interrogatories to the jury requiring answers to the questions: (1) whether appellant was totally and permanently disabled since January, 1938; and (2) whether he had received medical treatment from the date of lapse of policy to the date of its reinstatement.

In July, 1927, when appellant made application for reinstatement and conversion of policy, such reinstatement was procurable by two methods. Under 44 Stat. 799, see Title 38, § 515, U. S. C. A., where a veteran could not comply with the requirements of the rules and regulations as to physical condition, the application would be approved, provided that the applicant's disability was the result of an injury or disease contracted

in active military or naval service during the World War. However, it was provided that under this section of the statute, the applicant should submit proof satisfactory to the Administrator of Veterans' Affairs, showing that he was not totally and permanently disabled. Furthermore, he was required to pay back all monthly premiums which would have become payable if the insurance had not lapsed, together with interest on each premium from the date it was due by the terms of the policy. If the applicant was unable to pay such premiums, with interest, on a showing to the Administrator of Veterans' Affairs, the application might be approved and the amount of unpaid premiums, with interest, placed as an interest-bearing indebtedness against the insurance.

The second method of securing reinstatement of a lapsed policy was by compliance with the Regulations of the Veterans' Bureau. These Regulations provided that lapsed insurance, in order to be reinstated, required an applicant to tender one premium payment on the term insurance to be reinstated and converted, and one monthly premium on the insurance. In case more than three calendar months had expired from the date on which the unpaid premium was due, the Regulations further provided that, at the time of his application, the veteran should be in good health, and so state in his application; and that he should submit a report of a complete medical examination "and such other evidence relative to his physical and mental condition and insurability as may be required by the Director and on such forms as the Director may prescribe." Sections 4110, 4112,

Regulation 138 of Regulations and Procedure, United States Veterans' Bureau, page 175.

In 1927, at the time of application for reinstatement, § 200 of the World War Veterans' Act, 44 Stat. 793, 38 U. S. C. A. § 471, providing for compensation for death or disability of members of the armed forces who served in the World War, included the following:

"For the purposes of this Act every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department who was discharged or who resigned prior to July 2, 1921, and every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department on or before November 11, 1918, who on or after July 2, 1921, is discharged or resigns, shall be conclusively held and taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, disorders, or infirmities made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of the active service."

It is admitted by the Government that this conclusive presumption of sound physical condition or health, in addition to being applicable to § 200 of the Act, was also applicable to § 304 of the Act, see Title 38, § 515, U. S. C. A., above mentioned. Appellant did not proceed under the provisions of the statute which permitted reinstatement without complying with requirements as to physical condition. Instead, he filed his application for reinstatement pursuant to the Regulations, which did require medical examination and

the presentation of such other evidence relative to his physical and mental condition and insurability as was required by the Director; and after undergoing such a medical examination, and the filing of a report thereof and the other evidence required as to physical condition, his insurance was reinstated and converted.

In answering the printed questions in the application for reinstatement of insurance, appellant stated that he had never been treated for any disease of the genito-urinary organs; and in reply to a question of the examining physician, he stated that he had never had syphilis. However, he testified that he believed these questions only referred to the period subsequent to default in payment of insurance premium. In support of this claim, he stated that the other printed questions in the application—as to whether he was in as good health as he was *at the due date of the premium in default*, and whether he had been ill or contracted any disease or consulted a physician in regard to his health *since the lapse of the insurance*—led him to this conclusion. He further testified that he had not consulted a physician or received treatments for syphilis prior to the reinstatement of his policy. He explained that certain statements which he had made in 1933, to the effect that he had consulted a Dr. Smith in Hot Springs, Arkansas, and had received such treatments in 1926, were the result of mistake. With regard thereto, he testified that the actual fact was that he had only been in Hot Springs, Arkansas, once in his life, and that the physician he consulted and from whom he received treatments for syphilis

was Dr. Oliver A. Smith, and that the time of such treatments and consultation was in 1930—which was subsequent to his application for reinstatement. His counsel introduced in evidence, a statement of Dr. Smith that he had so treated appellant in 1930. There was no evidence that any treatments had been given him in 1926, except appellant's own allegedly erroneous statement.

Whether he had consulted a physician and received treatments from the time of the lapse of his policy until its reinstatement, was a question of fact for the jury, and as such, was properly submitted by the trial court. Had appellant been treated for the disease subsequent to the lapse of the policy and prior to its reinstatement, such fact would bear upon the question of his good health, which was pertinent in any application for reinstatement. Furthermore, whether appellant misunderstood the questions on the application and believed that they related solely to the period between the lapse of his policy and its reinstatement, or whether he knew that they also included the period before his enlistment and had deliberately misrepresented the facts, would ordinarily be a question for the jury also. But it is unnecessary to resolve this latter issue, as it is our conclusion that no inquiry as to the question of syphilis prior to appellant's enlistment was proper or material.

Statutory provisions in effect at the time when appellant made application for insurance reinstatement (44 Stat. 793), set forth that "for the purposes of this Act" a member of the armed forces was conclusively presumed to be in sound condition at the time of his enlistment. Such presumption applied whether a veteran sought

reinstatement under the express terms of the statute or under the Regulations of the Veterans' Bureau. The making of such Regulations by the Administrator of the Veterans' Bureau was authorized by statute. Title 38, § 426, U. S. C. A. Inasmuch as the statutory presumption was applicable for the purposes of the Act, it was applicable to the Regulations of the Bureau, which were created by virtue of the statute to carry out the purposes of the Act. The fact that the statutory provision as to the presumption was amended in 1930, 46 Stat. 995, and was thereby limited "for the purposes of this section [Title 38, Sec. 471, U. S. C. A.] and section 515 of this title," instead of "for the purposes of this Act," is of no importance in the decision of this case; and we are not called upon to determine whether, under such amendment, the presumption in question would be applicable to the Regulations governing reinstatement of insurance. Appellant's application and the reinstatement, as well as his rights thereunder, are to be judged in the light of the statute as it existed when the transaction took place.

If, therefore, appellant had syphilis before his enlistment, the statute required, nevertheless, that he be conclusively presumed, at such time, in sound condition. A presumption that appellant was in sound condition at the time of his enlistment, obviously, is a presumption that he was not then afflicted with disease. Nevertheless, he had syphilis at that time. Apparently, the disease was in a quiescent state and was not recognized by the Army medical examiner in 1918. But it is a matter of common knowledge that syphilis

pursues its course in a hidden, treacherous way, and that after its first symptoms have disappeared, it often slumbers in the blood stream without further manifestation of its presence during many years, until it suddenly reappears to strike down its unsuspecting victim in disability, insanity, or death.

In the case before us, it appears that, although appellant was treated in 1915 and thought he was cured, the disease continued its unperceived and slow ravages in his body until 19 years later, when its course resulted in insanity. Appellant's present disability results from the continuous disease from which he was suffering at the time of his enlistment. The Government cannot now be heard to say that appellant was afflicted with syphilis at the time of his entry into the armed services and that reinstatement of insurance should be denied because he was then afflicted with the same disease from which he is now suffering. That defense was removed when Congress enacted the statute providing that, for the purposes of the Veterans' Act—which included reinstatement of insurance by virtue of statutory provisions, as well as reinstatement pursuant to Regulations of the Veterans' Bureau as authorized by the Act—a veteran must be conclusively presumed to be in sound health at the time he joined the Army. A requirement that appellant disclose that he was afflicted with syphilis at the time of his enlistment or prior thereto, as a basis for denial of his application for reinstatement, was a violation of the presumption that he was not so afflicted; and this conclusive presumption controls, whether reinstatement be under the express provi-

sions of the statute or under regulations authorized by the Act. The statutory presumption, as it existed in 1927, was conclusive for *all* the purposes of the Act.

But it is contended that the inquiry whether appellant ever had syphilis presented the question of the state of his health as of the date of his application for reinstatement. However, it would present such question only by indicating that he had the same disease on the date of such application as he had at the time of his enlistment; and by the presumption of law enacted for his benefit, he was conclusively held to be in sound health at that time. In this case, it could be said that if appellant had been afflicted with syphilis before his enlistment, he was conclusively presumed to have been cured of such disease and in sound health at the time he enlisted.

Investigation of pre-service syphilis in order to ascertain the present state of appellant's health could only be justified on the ground that he was not cured of the disease at the time of his enlistment and was not then in sound health. Such an inquiry and such an assumption, the statute forbids.

It is not surprising that, in interpreting statutes, anomalies of reasoning may result when a conclusive presumption of a state of facts is directly contrary to the admitted facts. However, as evidenced by the contentions of the representative of the Veterans' Bureau and counsel for appellee during the trial, the actuality of the present situation is, not that the Government complains that it was entitled to know of pre-service syphilis as bearing on the health of appellant at the time

of application for reinstatement, but that it required such information in order to refuse reinstatement if appellant ever had syphilis, whether before or after his enlistment in the Army. It was in accordance with this contention that the trial court instructed the jury that because the Government had such a right, a misrepresentation that appellant never had syphilis was material, and if knowingly made for the purpose of causing the Government to rely thereon, was fraudulent. The attitude of the Veterans' Administration in the present case seems, however, changed from its earlier views, as in 1927, when the reinstatement here in question was granted, it appears from the evidence that it was the policy of the Administration to reinstate in cases where a past history showed syphilis, if, after treatment, the blood test was negative; and the application for reinstatement in the present case required written answers *by the veteran* as to contracting disease, suffering injury, ill health, or consultation with a physician, *only subsequent to the lapse of insurance*.

The Veterans' Bureau had the right, in passing upon the application for reinstatement, to require a physical examination of appellant and a statement from him that he was in good health, as well as information from him as to any consultation with a physician, or any disability, injury, or disease occurring subsequent to enlistment. These requirements were satisfied by appellant. If fraudulent misrepresentations were made as to any of the foregoing, the reinstatement could be canceled; and whether they were so made by appellant was, from our examination of the record, a question for the jury. But it was error to sub-

mit questions as to pre-service syphilis. Any statements made in connection therewith were immaterial, for the Government could not, in law, be misled by them as it could not rely upon them for the purpose of reinstatement.

With regard to the refusal of the trial court to submit proposed written interrogatories to the jury, no error can be predicated thereon, as such submission is discretionary with the court under the rules which control such practice. See Rule 49, Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723e; Moore's Federal Practice, Vol. 3, pages 3095-3098. Other complaints concerning the trial court's instructions as to presumption of fraud and weight of the evidence, are without merit. In order to sustain his cause of action under the pleadings and proof, appellant was required to show total permanent disability only subsequent to 1939.

In accordance with the foregoing, the judgment is reversed, with direction to award appellant a new trial.

APPENDIX B

The administrative practice regarding past syphilitic infection of an applicant for reinstatement of yearly renewable term insurance and the extent of inquiry concerning it are shown by the following letter from the Administrator of Veterans' Affairs and certain documents attached to the letter:

VETERANS' ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR OF
VETERANS' AFFAIRS,

Washington, March 28, 1944.

Honorable FRANCIS M. SHEA,
Assistant Attorney General,
Department of Justice,

Washington, D. C.

MY DEAR MR. SHEA: Consideration has been given to your letter (LPS WCP) in which you state:

The Circuit Court of Appeals for the Sixth Circuit held in *Van Pelt v. United States*, 134 F. (2d) 735, that section 200, World War Veterans' Act, as amended July 2, 1926, prevented inquiry by the Veterans' Administration into illnesses or injuries or treatment for illnesses or injuries antedating the military service of an applicant for reinstatement of yearly renewable term insurance under administrative regulations.

The District Court of the United States for the Southern District of Ohio, in accordance with its interpretation of the

opinion mentioned above, has entered judgment against the United States upon pleadings establishing the falsity and (except insofar as section 200, World War Veterans' Act, as it was worded between July 2, 1926, and July 3, 1930, may be regarded as requiring a contrary conclusion) the materiality of misrepresentations with respect to preservice illness because of syphilis and treatment therefor, made with the intent to deceive, and relied upon by the Government in the issuance of insurance upon an application for reinstatement executed in 1927.

The case is again pending on appeal in the Circuit Court of Appeals, and I believe that it would be helpful to the Court if you would furnish me, in a letter to be incorporated in the Appendix to the Government's brief, a statement of what the administrative interpretation and practice has been with respect to requiring disclosure, by an applicant for reinstatement of insurance, of information concerning illness and treatment antedating entrance into service.

It has been the practice of the Veterans' Administration and its predecessors in the administration of the War Risk Insurance Act, as amended, and of the World War Veterans' Act, as amended, to inquire of any applicant for reinstatement of insurance under the good health requirements of the regulations whether he ever had syphilis or had been treated therefor. I attach for your information a copy of Form 742 (Insurance Division) of the Bureau of War Risk Insurance, Treasury Department, which went into use as early as July 1920, about 24 years ago, and ask attention to question g, "Has applicant ever

had syphilis, gout or rheumatism?" A similar question has been covered in later revisions. The same practice has been followed with respect to applications for reinstatement under Section 304 of the World War Veterans' Act, as amended, or Section 408 of the War Risk Insurance Act, as amended. The presumptions embodied in Section 300 of the War Risk Insurance Act, as amended, and in Section 200 of the World War Veterans' Act, as amended, have not been regarded as affecting such practice.

The purposes of the amendment to Section 200 of the World War Veterans' Act, which was sponsored by the then Veterans' Bureau, have been regarded as limited to authorizing reinstatements of insurance under Section 304 by the persons affected by such presumption, as is indicated by the clarifying amendment to Section 200 of the World War Veterans' Act, 1924, on July 3, 1930.

The alternative to this inquiry as to syphilitic condition in connection with the good health requirements of the regulations, and possibly also as to reinstatement under Section 304 of the World War Veterans' Act, as amended, would have meant a more searching examination with increased expense to the Government and greater inconvenience to the applicants.

For your information I enclose copies of certain material illustrative of the attitude toward inquiries concerning syphilis in connection with the reinstatement of insurance or the granting of insurance initially where good health is a factor. I would ask your attention to paragraph 2 of Circular 367, Adjudication Service, Examinations for Reinstatement of Insurance, June 9, 1926, found in

the printed Regulations and Procedure, U. S. Veterans' Bureau, Part II, page 1684. Circular 419 of the Medical Service, Physical Examinations for Reinstatement of Insurance, March 30, 1927 (in the same compilation at page 1718), is also enclosed, and your attention is asked to paragraph 1 of said circular. On May 23, 1939, the Assistant Administrator requested an expression of medical opinion as to the curability of syphilis, to which a reply was made on May 25, 1939. Copies of the inquiry and reply are likewise enclosed. Finally, a form questionnaire used by the Insurance Division and prepared March 9, 1929, is transmitted at this time, as this questionnaire gives in outline form information requested regarding syphilis where a notation of such condition appeared on an application for reinstatement of lapsed Government insurance.

Very truly yours,

(s) FRANK T. HINES,
Frank T. Himes,
Administrator.

Enclosures.

So far as here pertinent, Form 742, referred to in the foregoing letter, reads as follows:

TREASURY DEPARTMENT

BUREAU OF WAR RISK INSURANCE, INSURANCE
DIVISION

Form 742—Revised July 1920

REINSTATEMENT APPLICATION FOR TERM
INSURANCE

After Discharge From the Military or
Naval Service

* * * * *

(f) Have you ever been treated for any disease of the brain or nerves, throat or lungs, heart or blood vessels, stomach, liver, intestines, kidney or bladder, or other genito-urinary organs, skin, bones, glands, ears, or eyes? If yes, state which and describe fully.

* * * * *

(g) Has applicant ever had syphilis, gout, or rheumatism?

* * * * *

(Circular No. 367, Adjudication service)

EXAMINATIONS FOR REINSTATEMENT OF INSURANCE

JUNE 9, 1926.

1. When an application is made through the regional office for reinstatement of insurance, term or converted, the examining physician should exercise care and judgment in filling out the forms (742 and 807) and see that all questions are answered as fully as possible. When a disability is found to exist the examining physician should make more than an affirmative answer and furnish sufficient information relative to the condition as to enable central office to determine the insurance risk in the particular case. Reference such as "see the claims file" is of no value, as the claims file is retained in the regional office.

2. If there is a history of syphilis the examiner should state whether or not there are at this time any manifestations of the disease, the date when the last Wassermann test was made and the result. If a tachycardia exists the examiner should give more than the mere pulse rate. The cause of the tachycardia should be stated. Where the urinalysis shows albumin present, microscopical re-

port should be submitted. If at the time of the examination some abnormal or pathological condition is found and the examining physician has some difficulty in making the diagnosis or is of the opinion that the condition may be transitory in nature, the applicant should be reexamined in 24 or 48 hours, where feasible, to check up the findings of the first examination.

3. If sufficient care is exercised in reporting the condition found by the examining physician at the first examination it will relieve the central office of the necessity of requesting reexamination, save time and expense for the Bureau and inconvenience to the applicant.

CHARLES E. MULHEARN,
Assistant Director.

(Regulations & Procedure, United States Veterans' Bureau, page 1684.)

Circular No. 419, referred to in the foregoing letter from the Administrator of Veterans' Affairs, is addressed to the Medical Service, but is in substance the same as Circular No. 367, above addressed to the Adjudication Service.

MAY 23, 1939.

From: Assistant Administrator, H. W. Breining.
To: Assistant Administrator, G. E. Ijams.

Curability of Syphilis.

In consonance with the general practice followed by commercial insurers, the Veterans' Administration does not at this time regard applicants for new insurance or for reinstatement of lapsed insurance, who have a history of syphilis, as in good health from an insurance standpoint

as required by the law and regulations in order to be entitled to such insurance. Such applications accordingly are being disapproved.

The practice of the Veterans' Administration in this regard is based upon the conclusion that at this time pathologic or radical cure of syphilis is still on a basis of theory rather than finally established fact. The Administration has taken the position that until such time as it is definitely proven that syphilis can be completely eradicated, it will adhere to its present procedure.

I am aware of the fact that there exists in the medical profession some difference of opinion as to the curability of syphilis. There may be some developments as to this question which would merit further study at this time.

May I therefore request that the Medical Director advise me whether or not, in his opinion, it can now be definitely proven that syphilis can be completely eradicated.

(S.) HAROLD W. BREINING.

MAY 25, 1939.

ASSISTANT ADMINISTRATOR.

Mr. BREINING, Assistant Administrator.

Curability of Syphilis.

The Medical Director, to whom I referred your memorandum of May 23, on the captioned subject, requests me to advise you as follows:

1. He is in accord with the present policy you are following, viz., disapproval of applications for new insurance or reinstatement of lapsed insurance from persons having a history of syphilis. He believes this policy reflects authoritative medical opinion; is justified by the requirement placed

upon you, by law and regulations, to accept only applicants for insurance who are in good health; and is in consonance with the practice of commercial insurers.

2. He further advises that present day medical opinion calls for no change in this policy; and, answering the question in the concluding paragraph of your memorandum of May 23, he is of the opinion that, in the present state of our knowledge, it cannot be stated unqualifiedly that there is proof that syphilis can be completely eradicated.

3. He invites attention to the accompanying copy of a memorandum of October 29, 1934, from the Acting Medical Director to the Director of Insurance, subject—"Insurability of 'cured' cases of syphilis," in which there is a technical discussion of this subject, which it is thought you might wish to review.

Att. (S.) GEORGE E. IJAMS.

DEAR SIR: With reference to your examination of Mr. _____ made in connection with an application for reinstatement of his lapsed U. S. Government Insurance, it is requested that you obtain the following additional information regarding syphilis, which will be treated as confidential.

1. Was there an initial lesion? If so, give date.
2. What were the ensuing symptoms, if any, in order of their occurrence?
 - (a) Sore throat?
 - (b) Rash?
 - (c) Headaches?
 - (d) Pain in bones?
 - (e) Alopecia?
 - (f) Nervous manifestations?

(g) Gumma—with date of any symptoms developed.

(h) Lesions or scars on tongue or fauces.

3. Was a diagnostic blood examination obtained? Spinal fluid? If so, with what result? How many tests and what intervals?

4. What treatment was employed and continuous duration of same? If intermittent, give approximate dates of employment and intermission.

5. Give the date of final discontinuance of all treatment.

6. Furnish the report of a current Wassermann.

A letter has been written the applicant asking him to call on you at his earliest convenience, in order that you may reexamine him.

The Bureau appreciates your courtesy in furnishing this additional information, the report of which should be forwarded to this Bureau, attention the Insurance Medical Section.

By direction:

H. F. BRALL,

Acting Chief, Insurance Division.

I. D. F. 178. (3-9-29.)

